

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
SUFFOLK COUNTY WATER : 17-cv-06980-NG-RLM
AUTHORITY, :
Plaintiff, :
: :
- versus - : U.S. Courthouse
: Central Islip, New York
: :
: :
THE DOW CHEMICAL COMPANY, : February 9, 2021
et al., : 2:05 PM
Defendants :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE NINA GERSHON
UNITED STATES DISTRICT JUDGE
AND
THE HONORABLE ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:
(TELEPHONICALLY)

For the Plaintiffs: Matthew K. Edling, Esq.
Victor Sher, Esq.
Katherine Jones, Esq.
Stephanie D. Biehl, Esq.
Nicole E. Teixeira, Esq.
Quentin Karpilow, Esq.
Sher Edling LLP
100 Montgomery Street
Suite 1410
San Francisco, CA 94104

For NY American Water: Frank R. Schirripa, Esq.
Hillary M. Nappi, Esq.
Hach Rose Schirripa
& Cheverie LLP
112 Madison Ave.
New York, NY 10016

For Hicksville Water: Lilia Factor, Esq.
Paul Napoli, Esq.
Napoli Shkolnik, PLLC
360 Lexington Ave.
New York, NY 10017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TELEPHONIC APPEARANCES (Continued):

**For Plaintiff Suffolk
County Water:**

Scott Martin, Esq.
Richard S. Lewis, Esq.
Katie R. Beran, Esq.
Jeanette Bayoumi, Esq.
Tamara Freilich, Esq.
Hausfeld LLP
33 Whitehall St., 14th Fl.
New York, NY 10004

For Defendants: Joel Alan Blanchet, Esq.

Joel Alan Blanchet, Esq.

Phillips Lytle LLP
One Canalside, 125 Main Street
Buffalo, NY 14203

For Defendant Dow:

Nader Boulos, Esq.

Kevin T. Van Wart,

Jason Miller, Esq.

Kirkland & Ellis

300 North LaSalle

333 NELSON EASTMAN
Chicago, IL 60654

For Defendant Ferro:

Robb W. Patryk, Esq.

Faranak Sharon Tabatabai, Esq.

Amina Hassan, Esq.

Hughes Hubbard & Reed LLP

One Battery Park Plaza

New York, NY 10004

NEW YORK, N.Y. 10001

For Defendant Vulcan:

Stephen C. Dillard, Esq.

Felice B. Galant, Esq.

Norton Rose Fulbright US LLP

1301 Avenue of the Americas

New York, NY 10019

For Defendant P&G:

David J. Lender, Esq.

Jed Winer, Esq.

Weil, Gotshal & Manges, LLP

767 Fifth Avenue

New York, NY 10153

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TELEPHONIC APPEARANCES (Continued):

For Defendant Shell: **Megan Rose Brillault, Esq.**
Daniel Mark Krainin, Esq.
Beveridge & Diamond P.C.
477 Madison Avenue
New York, NY 10022

Transcription Service: **Transcriptions Plus II, Inc.**
61 Beatrice Avenue
West Islip, New York 11795
laferrara44@gmail.com

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1 JUDGE GERSHON: All right. This is Judge
2 Gershon. Judge Mann, are you there? Hello, this is
3 Judge Gershon. Gina, just let me know when Judge Mann is
4 on, please.

5 THE CLERK: Yes, I will let you know when she
6 signs on.

7 JUDGE GERSHON: Thank you.

8 JUDGE MANN: This is Judge Mann on the line
9 now. I think from what I understand, everyone is on now.

10 JUDGE GERSHON: Yes. Hi, Judge Mann.

11 JUDGE MANN: Hi. Ms. Miller, do you want to
12 call the case?

13 THE CLERK: Certainly. This is 17-cv-6980,
14 Suffolk County Water Authority v. Dow Chemical Company,
15 et al. and related cases in front of Judge Gershon and
16 Judge Mann.

17 JUDGE MANN: And why don't we have counsel
18 state their appearances for the record.

19 MR. EDLING: Sure. Good afternoon, your Honor.
20 This is Matt Edling from Sher Edling, counsel for Suffolk
21 County Water Authority, as well as all of the related
22 cases with the exception of New York American Water and
23 Hicksville Water District. I will be speaking for the
24 plaintiffs this afternoon.

25 JUDGE MANN: And do we have anyone else with

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1 Mr. Edling?

2 MR. EDLING: Yes, your Honor.

3 JUDGE MANN: We might as well get everyone's
4 appearances. For the plaintiff?

5 MR. EDLING: Sure. Your Honor, we could do
6 that. We did give the names to your clerk and I did
7 offer to email the clerk everyone who has already
8 identified themselves for the clerk and who is on the
9 phone, but obviously if you would like, we can go back
10 through and introduce everyone.

11 JUDGE MANN: Well, I defer to Judge Gershon as
12 to whether or not she wants to have the roll call on the
13 record.

14 JUDGE GERSHON: I don't think it's necessary.
15 I would just ask that as each attorney identifies
16 themselves or herself that we know who may be speaking
17 today and anybody else who is just listening in, I don't
18 think we need more than what Mr. Edling has offered and
19 your clerk has all that information.

20 So for you, Mr. Edling, is anyone going to
21 speak besides you?

22 MR. EDLING: This is Mr. Edling. No, your
23 Honor --

24 JUDGE GERSHON: Okay.

25 MR. EDLING: -- unless I screw up, it's just

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1 me.

2 JUDGE GERSHON: That's fine. Okay.

3 And for the other plaintiffs? Anyone going --

4 MS. FACTOR: This is Lilia --

5 JUDGE GERSHON: Go ahead.

6 MS. FACTOR: Sorry, your Honor. This is Lilia
7 Factor from Napoli Shkolnik appearing on behalf of
8 plaintiff Hicksville Water District.

9 JUDGE GERSHON: Okay.

10 MR. SCHIRRIPA: Good morning, your Honor.

11 JUDGE GERSHON: And could you spell your last
12 name? No, let me just get counsel's last name? Go
13 ahead.

14 MS. FACTOR: Factor, F as in Frank, A-C-T-O-R,
15 Factor.

16 JUDGE GERSHON: Oh, yes, you appeared before me
17 recently, right, on the motion to dismiss, okay.

18 MS. FACTOR: Yes.

19 JUDGE GERSHON: All right. And North American
20 Water?

21 MR. SCHIRRIPA: Yes, your Honor. This is Frank
22 Schirripa from Hach Rose Schirripa & Cheverie for New
23 York American Water. Along with me is my colleague,
24 Hillary Nappi.

25 Good afternoon.

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1 JUDGE GERSHON: Okay, thank you. All right.

2 Can we go to the defendants then? Ms. Hill, do
3 you want to call them or however --

4 THE CLERK: Yes, defendant -- on behalf of
5 defendant Dow Chemical, please identify yourself.

6 MR. BOULOS: Good afternoon, your Honor.

7 This is Nader Boulos from Kirkland & Ellis on
8 behalf of Dow. I'm joined on the phone today by my
9 colleagues, Kevin Van Wart, Joel Blanchet and Jason
10 Miller of Dow. I will be speaking today on behalf of
11 Dow.

12 JUDGE GERSHON: Can you spell your last name
13 please for me?

14 MR. BOULOS: Certainly. It's Boulos, B as in
15 boy, O-U-L-O-S as in Sam.

16 JUDGE GERSHON: Thank you. Okay.

17 THE CLERK: And on behalf of defendant Ferro
18 Corp.?

19 MR. PATRYK: Good afternoon, your Honor.

20 My name is Robb Patryk from the firm of Hughes
21 Hubbard & Reed. With me on the call are my colleagues
22 Faranak Tabatabai and Amina Hassan and I will speak to
23 the extent Ferro makes comments.

24 THE CLERK: Okay. And on behalf of defendant
25 Vulcan Materials Co.?

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1 MR. DILLARD: Yes, good afternoon.

2 This is Stephen Dillard, D-I-L-L-A-R-D, along
3 with my colleague, Felice Gallant on behalf of defendant
4 Legacy Vulcan.

5 THE CLERK: Okay. And on behalf of defendant
6 in case 17-cv-6980 and case 19-cv-2150, Shell Oil Co.?

7 MS. BRILLAULT: This is Megan Brillault on
8 behalf of Shell Oil Co., along with my colleague Dan
9 Krainin.

10 JUDGE GERSHON: Could you spell your last name,
11 please?

12 MS. BRILLAULT: Absolutely. B as in boy, R-I-
13 L-L-A-U-L-T.

14 JUDGE GERSHON: Okay, thank you.

15 THE CLERK: And on behalf of defendant Proctor
16 & Gamble in case 17-cv-6980 and 19-cv-2150?

17 MR. LENDER: Good afternoon.

18 This is David Lender, L-E-N-D-E-R, from the law
19 firm of Weil Gotshal & Manges and I have on the phone
20 with me, my colleague, Jed Winer, W-I-N-E-R.

21 JUDGE GERSHON: Okay, very good. Do we have
22 everyone then?

23 THE CLERK: Yes, I believe so, your Honor.

24 JUDGE GERSHON: All right. Then counsel, Judge
25 Mann and I agreed that because we'll be talking first

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1 about trial management issues, that I'd begin the
2 discussion. Judge Mann, obviously, will feel free to
3 interrupt at any time with her own comments and questions
4 and when we turn to specific discovery issues, she'll
5 take the lead.

6 Let me make two general comments. It occurred
7 to me that this case is very similar to a multi-district
8 litigation other than it's only in one district by its
9 nature but I think it's helpful to think about that.

10 And the second general comment is just that I'm
11 saying trial management but as I think the parties
12 recognize, we're talking about overall case management,
13 management of summary judgment motions and other motions
14 and so on. So even though I use the word "trial
15 management", I understand that we're talking about the
16 whole ball of wax.

17 I'd like to start with some questions to the
18 plaintiff. Although you've used the term "bellwether" in
19 describing what you're seeking, it seems to me that you
20 are not, in fact, seeking to identify any of the 27 cases
21 here as a bellwether in either of the two sentences in
22 which that term is generally used; one in the mass tort
23 context as a test case which would serve as an example
24 and help the parties reach settlement of the other cases
25 or two, as a case which would be used to preclude parties

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1 in later cases on certain common issues of liability.
2 That is, as we understand it, you're only talking about
3 which cases of the 27 will be tried to completion first.
4 So I'd just like to know whether I'm correct about that.

5 MR. EDLING: Yes, your Honor. This is Matt
6 Edling speaking on behalf of the plaintiffs.

7 The plaintiffs do advance Suffolk County Water
8 Authority as a case that can and should be understood as
9 a bellwether in the sense of a test case as you've just
10 described it in the mass tort context. So that would be
11 point one.

12 The second point, in terms of case
13 prioritization in advancing a case to trial first is also
14 what we propose, and the reason that I am differentiating
15 those two is the defendants consistently have said that
16 they do not agree that a bellwether approach is
17 appropriate here for their own reasons.

18 Now while the plaintiffs clearly disagree with
19 that, as a means of moving these cases forward and
20 identifying, understanding and adjudicating what will be
21 common factual evidentiary and legal issues, prioritizing
22 the Suffolk County Water Authority case first, as well as
23 additional cases to move towards resolution can and I
24 suspect, will accomplish the same efficiencies as would
25 be gained in a bellwether context.

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1 So to repeat, we do believe that we are
2 advancing and suggesting the Suffolk County Water
3 Authority case, as well as other cases in that
4 traditional first sense of a bellwether but the
5 defendants --

6 JUDGE GERSHON: All right.

7 MR. EDLING: -- have opposed that, that's the
8 prioritization language as I identified in our recent
9 submission.

10 JUDGE GERSHON: All right.

11 MR. EDLING: Is that clear, your Honor?

12 JUDGE GERSHON: Yes, perfectly. I'll get to
13 that to discuss Suffolk in more detail but let me first
14 make a -- ask a more general question of both the
15 plaintiffs and the defendants. In response to the order
16 that Judge Mann and I issued recently, you have offered
17 no theory of prioritization. So we're curious, where are
18 your criteria for choosing a priority case? I'd like to
19 know your position on that. I'd like to know the
20 defendants' position on that and whether -- and I'd like
21 to know whether or not you've agreed on any metrics for
22 making your decision.

23 So let's here first from the plaintiffs and
24 then the defendants.

25 MR. EDLING: Sure, your Honor. This is Matt

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1 Edling again.

2 I apologize if our submission was not clear but
3 we are prioritizing Suffolk County Water Authority. If
4 you get a chance to look at the docket 161, which is our
5 submission, both in the first page and on page 4, we
6 specifically identify --

7 JUDGE GERSHON: No, I'm sorry. I think you
8 misunderstood me. I assure you Judge Mann and I have
9 reviewed your papers in some detail.

10 MR. EDLING: Sure.

11 JUDGE GERSHON: I said you offered no theory of
12 priority, other than that it's the first named case,
13 what's the basis for prioritizing? We recognize you want
14 to prioritize it.

15 MR. EDLING: Sure.

16 JUDGE GERSHON: Why?

17 MR. EDLING: Sure. So Suffolk County Water
18 Authority in addition to being the first filed case is
19 one of three cases that has all of the defendants in this
20 matter, so let's start there. It has all of the
21 defendants named in any of the cases are in the Suffolk
22 County Water Authority case.

23 The second, and this is unique to Suffolk
24 County, as distinct from Nassau County --

25 JUDGE GERSHON: Well, excuse me. Excuse me.

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1 It would hardly be an example then to the other
2 defendants in 25 or whatever the number is, cases, right?

3 MR. EDLING: No, I would disagree with that,
4 your Honor.

5 JUDGE GERSHON: I mean --

6 MR. EDLING: The reason is is that -- I'm
7 sorry, your Honor, did I interrupt you?

8 JUDGE GERSHON: Go ahead.

9 MR. EDLING: Okay.

10 JUDGE GERSHON: No, not at all. Go ahead.

11 MR. EDLING: Okay. The reason is is that Dow,
12 Ferro, and Vulcan are named in every case.

13 JUDGE GERSHON: Yes.

14 MR. EDLING: Dow, Ferro, Vulcan, Shell, and
15 Proctor & Gamble are identified in the Suffolk County
16 Water Authority case. So if we were to advance one of
17 the cases where Shell and Proctor & Gamble are not
18 defendants, common issues of fact discovery and evidence,
19 Shell and Proctor & Gamble, would not assumedly
20 participate for rational economic reasons.

21 Whereas in the Suffolk County Water Authority
22 case, the discovery that we would obtain as to the common
23 defendants in all 27 cases could be and should be applied
24 as to all those cases so the defendants get the benefit
25 of not having duplicative discovery and Shell and Proctor

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1 & Gamble's due process rights for their participation
2 would be ensured, whereas that would not be the case if
3 in fact we advanced prioritization for cases where they
4 are not named defendants.

5 JUDGE GERSHON: All right. If there's nothing
6 else from you, can we hear from the defendants, whoever
7 is talking?

8 MR. BOULOS: Your Honor --

9 MR. EDLING: Your Honor, I do have some
10 additional reasons why but I will be happy to --

11 JUDGE GERSHON: Oh, go ahead.

12 MR. EDLING: -- (indiscernible) speak.

13 JUDGE GERSHON: Go ahead.

14 MR. EDLING: Okay. In addition to the common
15 defendant, there are also common issues as to the Suffolk
16 County Water Authority case that apply to all of the
17 cases. Namely, whether or not the plaintiffs can
18 establish that the defendants, in fact, their products,
19 on a more likely than not basis, played a substantial
20 role in bringing about the injuries. That is common in
21 all cases.

22 What is unique and why I think it is
23 appropriate for the Suffolk County Water Authority case
24 to be prioritized is that one of the allegations as to
25 how the dioxane that is present in the wells for all of

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1 the plaintiffs, contributed to that is that in largely
2 unsewered areas in Long Island, stabilized TCA, a product
3 that we allege -- the plaintiffs allege was manufactured,
4 marketed and promoted by Dow, Ferro and Vulcan, led to
5 the contamination of the wells through contribution to
6 those unsewered areas, namely as an additive to Suffolk
7 tank cleaners.

8 That issue is largely not present in the Nassau
9 County cases, not just because those are largely
10 unsewered -- or pardon me, those are largely sewer
11 areas but that is a substantial reason why the Suffolk
12 County Water Authority case, just to give you an
13 illustration, has not just all of the defendants but has
14 all of the theories that need to be, and I suspect would
15 be prosecuted by any individual case, but probably more
16 important, would be an issue to the defendants as to
17 affirmative defenses they would seek to raise, as well as
18 discovery they would seek to advance.

19 JUDGE GERSHON: All right. Anything else or
20 should I turn to the defendants?

21 MR. EDLING: I'll -- I believe that's enough
22 for now, your Honor. Thank you.

23 JUDGE GERSHON: Okay. Thank you.

24 MR. BOULOS: Your Honor, Nader Boulos on behalf
25 of Dow.

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1 Going back to your Honor's question, I think
2 it's a very observation that neither party submissions
3 really set out a criteria for prioritizing and in the
4 defendants' case, I hope what comes through is that
5 that's not an omission but rather what we are saying is
6 that the facts that will be necessary in the first
7 instance, for the parties to make informed proposals to
8 the Court and ultimately, what's most important, for the
9 Court to make decisions about prioritization and how, by
10 which I mean structuring trial and pre-trial proceedings,
11 like summary judgment or expert work as your Honor
12 referred to, those facts simply aren't developed yet.
13 That's why defendants propose we need some period of
14 initial discovery to develop the record that will go to
15 the factors that I expect the Court will ultimately be
16 looking at; what's going to be a productive way to manage
17 these cases, should the Court and parties take up a
18 subset of one plaintiffs' wells or look at common issues
19 cutting across different water districts.

20 I think there are many different ways that the
21 Court could choose to ultimately structure the later
22 stages of this -- of the proceedings in this case but we
23 aren't at that later stage yet.

24 And I think where this really comes out is in
25 Mr. Edling's comments a moment ago and in the submissions

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1 we made about why we need discovery. It's clear that the
2 plaintiffs think it's sufficient to look at this case
3 from a 30,000-foot level and say there are common
4 products, so you can skip all the way back from the fact
5 that there's dioxane present in certain wells, all the
6 way up to the manufacturer level and talk about what
7 products could've led to the presence of dioxane.

8 What we are -- the reason we are asking for
9 discovery, the reason these depositions matter is that
10 these plaintiffs, the water districts, aren't identical
11 to one another and certainly even within a water
12 district, the wells are not identical to one another.
13 These are individual wells, miles apart, each one has a
14 different story on just the fundamentals of who, what,
15 when, where and how contamination got into those wells
16 and in every case, the answer to that is someone other
17 than the defendants.

18 Developing that record matters and informs the
19 court case management decisions its ultimately going to
20 make because it's central to the plaintiffs' claims,
21 central to causation, central to testing the sufficiency
22 of the warnings that are allegedly insufficient, central
23 to affirmative defenses as Mr. Edling referred to.

24 It may implicate third-party practice which
25 will be a consideration, I would expect in the way the

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1 Court chooses to structure the cases for later
2 proceedings.

3 So to be clear, we don't ask for -- we're not
4 asking to go do all the discovery in all the cases. What
5 we're asking for is a period of time to do some basic
6 discovery that will not be duplicated later that will
7 inform the decisions the Court is to make.

8 JUDGE GERSHON: All right. I'd like to return
9 back to the plaintiffs and Mr. Edling, you've spoken
10 about common factual issues as to the defendants. You
11 have identified with more specificity this afternoon than
12 you did in the letter, but how would common factual
13 issues as to the defendants affect the decision as to
14 what case to try in terms of it being a bellwether when
15 we're not talking about preclusion?

16 You're just saying it will be decided, when
17 it's all decided, then maybe the other cases will fold off
18 their own accord because decisions will have been made on
19 all of the issues, is that your point?

20 MR. EDLING: No, your Honor, but I think that
21 there were a couple of subparts to your question and I
22 will try to address each.

23 JUDGE GERSHON: Okay.

24 MR. EDLING: Once cases are advanced and
25 rulings are made by your Honor as a matter of law, and

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1 assumedly if it were to try, go to judgment, there
2 undoubtedly would be issues where -- which would be
3 preclusive in future cases.

4 I was approaching your Honor's initial question
5 both from the perspective of a bellwether in the sense of
6 would there or would there not be preclusive rulings, as
7 well as from the case management perspectives and I
8 attempted to answer both.

9 JUDGE GERSHON: All right. So you're talking
10 from the --

11 MR. EDLING: As --

12 JUDGE GERSHON: -- they would be preclusive in
13 a collateral estoppel sense.

14 MR. EDLING: Yes. Yes, your Honor. I also
15 based on experience, and this goes to your first point
16 this morning, which is this feels similar to an MDL,
17 although the cases are aggregated just in one district;
18 that is entirely correct. And the approach that is
19 frequently and perhaps always taken, and it is the
20 guidance of the Manual for Complex Litigation, is to
21 identify cases for advancement and prioritization to
22 obtain the efficiencies and in fact, the cost savings of
23 common discovery which is exactly what we propose here.

24 This is occurring right now in an MDL involving
25 water contamination asserting manufacturer liability

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1 theory, very similar to what we're asserting here which
2 is that --

3 JUDGE GERSHON: Are you talking about Judge
4 Gergel's case?

5 MR. EDLING: Yes, your Honor.

6 JUDGE GERSHON: All right. But you know,
7 you're talking about a mass tort case there, aren't you?

8 MR. EDLING: No, your Honor -- well, I was not,
9 your Honor. What Judge Gergel has done in that MDL is
10 has identified that the water provider cases, because
11 you're quite right that there are different types of
12 cases in that MDL before Judge Gergel, but what Judge
13 Gergel has done is said that there, and in fact there
14 are, hundreds of water provider cases and he has in his
15 written order, instructed the parties to identify
16 specific cases to prioritize in advance to be bellwether
17 cases. His words, your Honor.

18 I viewed that --

19 JUDGE GERSHON: I understand but I don't -- I'm
20 having -- I read his order. You cited it, I read it --

21 MR. EDLING: Yes, your Honor.

22 JUDGE GERSHON: -- as did Judge Mann. But it
23 seems to me that while we can -- it's appropriate to look
24 at MDL practice, this is not a mass tort case with
25 thousands of cases where you pick two or three. We're

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1 not talking about that. You're talking about picking a
2 huge case out of all of them, and maybe we should go to
3 that, I was going to get to that a bit later, but I don't
4 see how Suffolk serves as an example when it's too big.

5 And let me just put on the record right now,
6 Judge Mann and did not focus when we entered our recent
7 order and queried why Suffolk shouldn't go first, we
8 didn't focus on the fact that 300 of the 500 wells at
9 issue in the 27 cases are in the Suffolk case.

10 So I think you have to consider the slate clean on
11 that point, in terms of our position. We just focused on
12 its being the oldest.

13 MR. EDLING: Sure.

14 JUDGE GERSHON: So what you're proposing, seems
15 to me, not at all like what Judge Gergel has done.

16 MR. EDLING: So your Honor --

17 JUDGE GERSHON: It's interesting, not very
18 authoritative, it seems to me, for this case, let's put
19 it that way.

20 MR. EDLING: Sure. I won't spend much time on
21 Judge Gergel's order, other than to clarify that the
22 cases -- the potential cases for bellwether selection in
23 Judge Gergel's courtroom are only water provider cases,
24 many of which involve hundreds of wells far more than the
25 Suffolk County Water Authority case.

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1 Appreciating that is a different case, the
2 bellwether approach that Judge Gergel has identified and
3 the parties are working towards, are exclusively water
4 provider cases that were identified and proposed on the
5 basis of fact sheet and document production alone.

6 Moving to your --

7 JUDGE GERSHON: Okay. Well, what benefit is
8 accomplished by prioritizing more than half of the wells?
9 Where is the priority there?

10 MR. EDLING: What it's accomplished, your
11 Honor, is that the Suffolk County Water Authority case
12 has all of the defendants, 25 of the cases do not.

13 JUDGE GERSHON: Okay.

14 MR. EDLING: Additionally, there are factual
15 issues that reside in Suffolk County that are not at
16 issue in Nassau County. So as you look to, and you say
17 well there are 500 wells at issue in Suffolk County Water
18 Authority and there's no contestation, has more of the
19 impacted wells, you also have to look at part of the
20 theory of the case, your Honor, is that the contribution
21 to the harm from the defendants happened in three
22 discrete ways: one, through industrial debriefing
23 operations -- well, that's in Nassau County and in
24 Suffolk County; two, through ethoxylated surfactants.
25 Well, that's only Suffolk County and included in the

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1 Suffolk County Water Authority case; and three, that the
2 contribution to the harm through septic tank cleaning is
3 unique to Suffolk County. What case includes all of
4 those? The only one is Suffolk County Water Authority.

5 In addition, your Honor, this case is a
6 manufacturer liability case. It is not a CERCLA case.
7 So the theory that the plaintiffs are all advancing, and
8 which would be gained in a prioritization is in fact
9 going to provide benefits in every case.

10 And to be very specific, plaintiffs will prove
11 or not, that the warnings that were provided by the
12 defendants were adequate as to all, as to all; the time
13 does not matter as to our burden. If we cannot do that,
14 we will not win but that doesn't in any sense, inhibit
15 the appropriateness case, especially given while Suffolk
16 County Water Authority is of course the biggest, it also
17 has the most impacted citizens in Long Island.

18 So on the one hand it's larger, on the other
19 hand it's of outside import to the Island and because it
20 has the same factual issues, evidentiary issues and legal
21 issues as do all of the cases, as well as some additional
22 bases by which certainly the defendants have already
23 tried to secure discovery, it will be the only case that
24 would allow us to determine and efficiently prosecute all
25 of the affirmative defenses, all of the claims for relief

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1 against all of the defendants based on all of the
2 plaintiffs theories with common evidence. It is the only
3 one.

4 JUDGE MANN: May I ask, this is Judge Mann, if
5 I might just ask a question and I understand that you'll
6 say that not all the theories are present but you did say
7 much earlier that Suffolk County was one of three cases
8 that involved all defendants. And I'm not as much in the
9 weeds as to all 27 cases as you folks are, what are the
10 other two cases in which all defendants have been named
11 and how many wells are we talking about in those cases?

12 MR. EDLING: Yes, your Honor, that is
13 Hicksville, and New York American Water. I am not
14 counsel in those cases, so I don't know with granular
15 detail but I know that --

16 JUDGE GERSHON: Mr. Schirripa? Why don't we
17 let Mr. Schirripa and Ms. Factor answer that question.

18 MR. SCHIRRIPA: Yes, your Honor. This is Frank
19 Schirripa from New York American Water. I believe we
20 have 17 wells at issue.

21 JUDGE GERSHON: And Ms. Factor, you have 11
22 maybe, if I am remembering correctly?

23 MS. FACTOR: Yes, your Honor, we have 11 wells
24 and all five defendants --

25 JUDGE GERSHON: Okay.

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1 MS. FACTOR: -- are included.

2 JUDGE GERSHON: Yes. Okay.

3 MR. EDLING: Judge Mann, this is Matt Edling.

4 JUDGE MANN: Yes.

5 MR. EDLING: Just going to one particular point
6 that I've made, I do appreciate that Suffolk County Water
7 Authority is the largest case and that one would think
8 would lead to additional work by the parties. That said,
9 the Hicksville and New York American Water cases are not
10 in Suffolk County. So some of the common factual issues
11 and evidentiary issues that will be appropriately hotly
12 contested and provide insight to the parties, would not
13 be present in those cases.

14 And to just sort of step back for a moment, we
15 are not saying only Suffolk County Water Authority. If
16 the defendants want to identify other cases for
17 prioritization, we did not object to that. We also did
18 not object to their request for discovery in all of the
19 cases and identified as an appropriate, we thought,
20 proposal for their consideration, that they take up to
21 50, 5-0, depositions across the landscape of cases, in
22 addition to the Suffolk County Water Authority cases,
23 obtain third-party discovery as they determined would be
24 most useful to their defenses, which would include but
25 not be limited to their ability to assert that sources

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1 and third-parties were the or could be contributing
2 parties both to name for their own consideration, as Mr.
3 Boulos identified previously, the potential to be
4 identified as defendants in this case.

5 Those common issues are present in the Suffolk
6 County Water Authority case but we were not in any way
7 foreclosing or at least attempting to foreclose
8 defendants from securing discovery to aid in their
9 determination for prioritization as well, frankly, to go
10 towards the prosecution and defense of the case at large.

11 JUDGE MANN: Well, this is Judge Mann again.

12 I do intend to get into more specifics with
13 counsel later on in the proceeding regarding what is the
14 -- you know, what precisely are the contours of the
15 discovery that you're proposing but I don't want to go
16 down that road prematurely because I know that Judge
17 Gershon has other issues to address with the group.

18 JUDGE GERSHON: Okay. So let's talk about the
19 -- let's see, the elephant in the china shop. No one has
20 said anything about how long a case like Suffolk County
21 case would take to try and we're aware of that in now
22 Judge Scheindlin's MTBE 2007 decision when she was
23 talking about trying -- just a subset of Suffolk wells,
24 that that was going to take a very, very long time.

25 So if we're talking about trial management, Mr.

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1 Edling, I take it you're talking about trying all 300
2 wells in one trial and how long do you say that would
3 take to do?

4 MR. EDLING: Yes, your Honor, I do and I'm
5 going to answer you. I'm also going to invite my
6 partner, Vic Sher, who tried that New York City case that
7 Judge Scheindlin presided over, as well as was pretrial
8 and lead counsel in the State of New Hampshire case which
9 involved more wells than what we're talking about here,
10 each went to verdict.

11 We are advocating and will prove based on our
12 common liability theory that the defendants warnings were
13 inadequate and that their products were a substantial
14 contribution to the harm in each well as to all wells.
15 We do not intend nor do we need to prosecute this on a
16 well-by-well basis, that has been tried and as your Honor
17 has already indicated, affirmed by the Second Circuit in
18 an approach that we would propose here, which is to
19 say --

20 JUDGE GERSHON: Okay, but that's a different
21 case, right? The case that went up to the Circuit is not
22 the case that I'm talking about, right, is it?

23 MR. EDLING: Yes, your Honor, I'm aware of it.
24 Sure, I believe you were referring to the Suffolk County
25 Water Authority case and the MTBE prosecution.

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1 JUDGE GERSHON: Right, not the one -- not the
2 Exxon case.

3 MR. EDLING: Well --

4 JUDGE GERSHON: Not the one that was --

5 MR. SHER: Your Honor?

6 JUDGE GERSHON: Not the -- let's be clear,
7 we're talking about the same decision.

8 MR. SHER: This is Victor Sher, your Honor, if
9 I may?

10 JUDGE GERSHON: Yes.

11 MR. SHER: The Suffolk County Water Authority
12 MTBE case was a prioritized case for discovery and trial,
13 among others, including the City of New York's case.
14 That case, that is the Suffolk County Water Authority
15 case, settled in part because it was advanced and then
16 the New York City trial was tried later before Judge
17 Scheindlin in 2009.

18 JUDGE GERSHON: Okay. Right, that's my
19 understanding.

20 MR. SHER: I think --

21 JUDGE GERSHON: Okay.

22 MR. SHER: -- I think the point that my
23 partner, Matt Edling is trying to make here is that in
24 terms of trying the cases, and when we prepared for trial
25 and tried the New Hampshire statewide case which involved

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1 thousands of public water supply wells -- I'm sorry,
2 hundreds of thousands of private wells, the nature of the
3 proof focused on expert testimony concerning the kinds of
4 fundamental issues that Mr. Edling's talking about; were
5 there adequate warnings, what were the state of practices
6 by handlers of the product and disposers of the product,
7 and the common manufacturer liability questions, that
8 none of these cases were tried on a well-by-well basis
9 and --

10 JUDGE GERSHON: Okay, then how long do --

11 MR. SHER: -- the length --

12 JUDGE GERSHON: How long would you estimate
13 that the Suffolk County Water Authority case that you're
14 proposing be prioritized will take to try?

15 MR. SHER: From the plaintiffs' perspective,
16 this is a six-week case. That is the -- we don't see the
17 liability issues or causation issues as complicated and
18 the main issue will be frankly, damages and these are
19 cases that can be efficiently managed and both sides can
20 do it.

21 Now the New York City trial took -- it was
22 phased, it took a total of, I think a little over two
23 months, and the State of New Hampshire case took a little
24 over -- about the same length of time to try and we can't
25 control that -- you know, at this point, I think you'll

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1 hear that it will take essentially forever from the other
2 side but it's just not true.

3 JUDGE GERSHON: All right. Let me hear from
4 the other side.

5 MR. BOULOS: All right. Your Honor, this is --

6 JUDGE GERSHON: If you want to address this at
7 all, if you don't want to, I'll go on because I have more
8 questions.

9 MR. BOULOS: Your Honor, it's Nader Boulos.

10 I will just very briefly --

11 JUDGE GERSHON: Okay.

12 MR. BOULOS: -- (indiscernible) that this case
13 is very different from MTBE in that there, there was
14 essentially one source, the distribution pipeline of gas
15 line, so -- excuse me, of gasoline. So those cases did
16 not present the issues that the plaintiffs clearly will
17 have to deal with here in terms of all the potential
18 sources, the plaintiffs and defendants will have to deal
19 with that.

20 It's not sufficient, it doesn't answer the
21 question to simply say this is a manufacturer liability
22 case or to simply say that we're going to present this
23 case in a way that allows decision on all the warnings.

24 It matters when those warnings were given, to
25 whom they were given, what the recipients of those

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1 warnings knew, and what they did. That inevitably makes
2 this a well-by-well analysis. And that is the reason
3 that prioritizing, in other words, putting at the front
4 of the line for trial, the case with 300 wells will never
5 allow the other cases to progress.

6 JUDGE GERSHON: All right. Let me go back and
7 ask another question that we've been circling around and
8 I want to ask the plaintiffs something, and eventually
9 though I'm going to get back to some of the issues that
10 Mr. Boulos has just raised.

11 So the defendants in their letter seem to
12 suggest the possibility of common issues that can be
13 tried together on which I understand they mean that not
14 picking a case as such but possibly trying certain issues
15 from multiple cases, plaintiffs say they don't "advocate"
16 for this but they say they haven't "foreclosed" it. So I
17 would like to ask the plaintiffs whether if your proposal
18 as to Suffolk isn't accepted, shouldn't the parties be
19 consulting on this alternative possibility or do you not
20 want to face that at the moment?

21 MR. EDLING: This is Matt Edling, your Honor.

22 JUDGE GERSHON: Yes.

23 MR. EDLING: And I don't ever think it's good
24 (audio interference) not to answer a judge's question, so
25 I will do so.

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1 The concept and construct that this must be
2 prosecuted and tried on a well-by-well basis as Mr.
3 Boulos just referred to, I think was the (audio
4 interference) of your question and the reason I say that
5 is plaintiffs will prove or not that the defendants
6 warnings were inadequate to all because the assertion is
7 they never included any warning as to the disposal,
8 handling or anything, relating to dioxane.

9 That is an issue that would be subject to
10 common proof and perhaps even adjudication at summary
11 judgment and that would touch upon all cases and is a
12 common issue. It is also the reason why the well-by-well
13 approach that the defendants say is necessary is in fact
14 not necessary. Plaintiffs will prove that the
15 defendants' products are insubstantial part in every well
16 through plaintiffs' own evidence which shows as a matter
17 of chemistry because there is a chemical fingerprint as
18 to almost, if not 100 percent of the wells at issue in
19 this case, tying it to the defendant's products.

20 So that's point one, that's a common issue and
21 the warning, and it is plaintiffs' theory that the
22 warnings were inadequate to all is a reason why a well-
23 by-well -- is just one reason, but is any reason and a
24 cheap reason why a well-by-well approach is simply a
25 recipe for madness and endless and costly discovery.

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1 The issue as to the adequacy of warning and
2 causation which cuts across all cases, I would advance is
3 an issue and perhaps a series of issues that the parties
4 could present to each of your Honor as something that we
5 would not foreclose in advance as common issues that
6 could be ultimately adjudicated either by your Honor at
7 summary judgment or to the trier of fact, typically
8 although not as you I am sure are aware, causation and
9 the adequacy of warnings are frequently issues of fact
10 but not always.

11 JUDGE GERSHON: All right. Let me move onto
12 another issue and this is again, directed to the
13 plaintiffs. If we got the Suffolk case ready for trial
14 or summary judgment, would virtually all of the discovery
15 that you want from the defendants in all of the cases be
16 done?

17 MR. EDLING: Yes. This is Matt Edling and the
18 answer is yes, your Honor.

19 JUDGE GERSHON: Okay. And so --

20 MR. EDLING: But the reciprocal is not correct.

21 JUDGE GERSHON: So what -- yeah, what wouldn't
22 be done? I mean, what I'm looking at is both sides here
23 have said that we can talk about prioritization before
24 all the discovery is done and I'm kind of wondering why
25 -- frankly, why the defendants have agreed to that. I

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1 mean, if all of the discovery of the defendants will be
2 done, once you've finished with Suffolk County, we're
3 talking about discovery of the individual plaintiffs
4 here.

5 MR. EDLING: Your Honor?

6 JUDGE GERSHON: The damages can -- go ahead.

7 MR. EDLING: So I apologize, I didn't mean to
8 interrupt.

9 JUDGE GERSHON: Go ahead. No, no, I'm just --

10 MR. EDLING: Right.

11 JUDGE GERSHON: I'd rather hear from you.

12 MR. EDLING: This is Matt Edling, your Honor.

13 JUDGE GERSHON: Okay.

14 MR. EDLING: I will lead with why the
15 reciprocal is not true and there are two very clear
16 reasons why the issues that would be prosecuted and
17 resolved for the authority cut across all cases and why
18 it's the most efficient. I've already discussed with
19 your Honors the common defendants unique to the three of
20 the 27 cases.

21 JUDGE GERSHON: Right.

22 MR. EDLING: Additionally, the location of the
23 wells being in Suffolk County focus in theory of
24 liability unique to Suffolk County. And the third, which
25 we have not touched upon, but is also unique to Suffolk

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1 County, and frankly unique only Suffolk County Water
2 Authority, is the following.

3 Shell and Proctor & Gamble are defendants I
4 this case, not the Nassau County cases, based upon the
5 allegation that their product, their consumer products
6 have contributed to the harm of certain wells. Whereas
7 the stabilized TCA product which are as alleged, marketed
8 -- manufactured, marketed, promoted and sold by Dow,
9 Ferro and Vulcan. The consumer products, we believe,
10 will only be at issue with a subset of wells as to all
11 the cases in the Suffolk County Water Authority case.

12 So we would be able to address all of the
13 defendants, all of the theories of liability, all of the
14 causation, all of the legal issue, as well as any
15 assertions as between the defendant, as to allocation on
16 a joint or several liability basis in the Water Authority
17 case, and only the Water Authority cases.

18 So this issue as to the Shell and Proctor &
19 Gamble defendants having them being able frankly to
20 obtain evidence and have their due process rights
21 protected, of course, is as I am sure more acutely their
22 issue than my own but our ability to identify and
23 determine their liability which would across a number of
24 cases is only unique to a certain number of wells that
25 I'll profess to you we believe are tied to a shallow

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1 water aquifer as distinct from the deep water aquifer
2 which provides supply well to the balance of the
3 defendants -- pardon me, the balance of the plaintiffs.

4 JUDGE GERSHON: So how much additional
5 discovery in quantity, in terms of how long would it
6 take, would be required to simply do all the discovery in
7 all of the cases before we try any case?

8 MR. EDLING: So this is Matt Edling, your
9 Honor.

10 JUDGE GERSHON: Yes.

11 MR. EDLING: (Audio interference) there are two
12 answers. As to the liability, the affirmative liability,
13 the affirmative liability discovery from the plaintiffs,
14 we would be able to complete that by, as we identified in
15 our proposal, Thanksgiving, the fact discovery, and then
16 the expert discovery would take several months. That's
17 in one case, right? We could do all the liability
18 evidence but that would apply across all the cases at
19 large.

20 If your Honor were to order fact discovery in
21 all of the cases, getting any one case ready for trial
22 would take years and the burden would be enormous on all
23 the parties --

24 JUDGE GERSHON: Why?

25 MR. EDLING: -- because obviously the defendant

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1 -- because the defendants would be --

2 JUDGE GERSHON: Why would it?

3 MR. EDLING: Sure. The defendants would be
4 taking discovery from every plaintiff, 27 of them,
5 multiple depositions, document collection, examination,
6 damages analysis, expert discovery as to the damages for
7 each claimant but the reverse is not true, which is to
8 say that the plaintiff in one case or perhaps two cases
9 or three cases, would be able to obtain discovery from
10 the defendants once. That is to say, Dow's witnesses,
11 Shell's witnesses, Ferro's witnesses, Vulcan's witnesses
12 would sit for one deposition and those would be the only
13 depositions they would sit for that would be equally and
14 readily available for whichever is the first case that's
15 put before your Honor for summary judgment at trial.

16 JUDGE GERSHON: What --

17 MR. EDLING: So advance --

18 JUDGE GERSHON: -- you've now -- you've been
19 talking about this being a single trial. If there's so
20 much damages discovery, should we be contemplating
21 separating out liability and damages at trial?

22 MR. EDLING: Your Honor, this is Matt Edling.

23 An issue as to the bifurcation of damages from
24 liability, I would -- we would contest but would brief
25 that before your Honor if that is an issue that you

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1 believe is necessary. I was focused more on your
2 question which is why would it take longer to prepare all
3 of the cases to complete fact discovery as distinct from
4 some subset and the reason is that there would be, and
5 the defendants would be entitled to, discovery as to each
6 plaintiff, whereas --

7 JUDGE GERSHON: But other than -- excuse me,
8 other than damages, what is this other discovery?

9 MR. EDLING: That would be the substance of the
10 discovery but it would be depositions and document
11 production and to be clear, your Honor, we did as a
12 proposal, suggest to the defendants that in addition to
13 the Suffolk County Water Authority case, which we believe
14 should be prioritized that we would be amenable for the
15 defendants to take that discovery from the plaintiffs,
16 albeit with some limitation because we assume, that we
17 would not be prosecuting and trying all of the cases at
18 once, such that the defendants would be afforded the
19 right to obtain the very discovery into the damages as
20 your Honor is identifying, across all of the cases but to
21 do so in a reasonable manner such that it wouldn't be
22 discovery as to every plaintiff in every case because
23 that would necessarily mean just because of time, if
24 there was no limitation under the -- and just you apply
25 the Federal Rules to every plaintiff in every case, that

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1 would take years to complete discovery if there is no
2 prioritization of cases.

3 JUDGE GERSHON: How do you --

4 MR. EDLING: If the defendants --

5 JUDGE GERSHON: Go ahead.

6 MR. EDLING: Your Honor --

7 JUDGE GERSHON: I'll hear from the defendants
8 on this as well but let me just ask this other question
9 of the plaintiffs. How do you respond to their argument
10 that they need discovery just to complete the pleadings
11 that is to identify third-party claims? Can I decide
12 what case to try before the pleadings are complete?

13 MR. EDLING: This is Matt Edling, your Honor.

14 My response would be --

15 JUDGE GERSHON: Yes.

16 MR. EDLING: -- that's what they've been doing
17 for two years. Our proposal permits them to do that now.
18 We simply said let's get on with fact discovery and have
19 a pretrial schedule in a case, as opposed to allowing
20 discovery to occur as to all cases at all times without
21 any trial date.

22 So to be clear, the defendants have, as have
23 the plaintiffs, have been pursuing third-party discovery
24 for years and they have more time to do that now, and
25 we're in no way limiting their right to seeking third-

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1 party discovery but at some point, the matters should be
2 ready for trial and the defendants be forced to either
3 name or not name additional parties in this case. And of
4 course, if they determine that there's some parties
5 seeking contribution, then they have that right in a
6 post-trial equitable contribution claim, if they so
7 choose.

8 But to be very clear, your Honor, years of
9 discovery into third-party defendants has already been
10 incepted by the defendants. No such other defendants
11 have been named but we are in no way foreclosing their
12 right to do it. We're simply saying we should have some
13 case we believe for the reasons I stated, it should be
14 the Authority's case, advanced, so that we can have
15 expert discovery occur and have that common liability
16 discovery as to the defendants completed.

17 JUDGE GERSHON: All right.

18 JUDGE MANN: This is Judge Mann again.

19 JUDGE GERSHON: Okay. Sorry, go ahead.

20 JUDGE MANN: Judge Gershon, is it all right?

21 JUDGE GERSHON: Sure, of course.

22 JUDGE MANN: I just wanted to ask, on behalf of
23 plaintiff, you've indicated that the discovery that the
24 plaintiffs are seeking is going to be common in all of
25 the cases. You could complete discovery of defendants,

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1 since we have a limited universe of defendants, and your
2 theory is that the adequacy or inadequacy of the warnings
3 would apply to all cases and wouldn't require a well-by-
4 well analysis. So your position is, you could complete
5 all that discovery by Thanksgiving.

6 But the defendants' position, they contest your
7 theory of the case. They say that that requires well-by-
8 well analysis. So for purposes of discovery, let's take
9 your approach for the moment that Suffolk County is going
10 to be prioritized and you say that it's going to be
11 discovery of defendants that's limited in scope, let's
12 assume that the defendants want discovery on 300 wells.
13 Are you suggesting that because of your theory that that
14 is not dispositive, they shouldn't be able to get
15 discovery on that?

16 And another question, if it would take years
17 without prioritization to do full discovery, then I would
18 think that you're still talking about a very substantial
19 time for full discovery for 300 out of 500 wells.

20 MR. EDLING: So your Honor --

21 JUDGE GERSHON: Good question. Thank you,
22 Judge Mann.

23 MR. EDLING: Judge Mann, this is Matt Edling.
24 I'll address both of your questions.

25 The first is are we foreclosing the defendants'

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1 right as to each well? The answer is no and, in fact, we
2 have produced information, documents, interrogatory
3 responses and fact sheets as to all wells and the
4 defendants have pursued third-party discovery that
5 applies to all wells and to each well. So we are in no
6 way foreclosing that. If that is the defense that they
7 wish to advance, they may. It is not what we will prove.

8 Second, the three to 500 well issue is a red
9 herring and the reason that it is a red herring is I was
10 basing my statement as to why it would take years to
11 ready all the cases for trial if in fact full fact
12 discovery were to apply to all 27 cases, not because it
13 would require or should or should not require a well-by-
14 well approach but instead, 27 cases necessarily would
15 lead the defendants to want to take depositions,
16 discovery, and focus on the damages as to each of those
17 27 cases.

18 Now I want to be very clear, your Honor, while
19 we believe the liability theory applies across all of the
20 plaintiffs' wells and doesn't require a well-by-well
21 theory to prove our case, as to the damages associated
22 with a given well, that can differ and I'll give you just
23 one very clear example.

24 There will be wells for every plaintiff that
25 are larger or smaller than others and if it is a larger

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1 well, it will require a larger treatment system to get
2 rid of the dioxane. Now, proving that the defendants'
3 contribution to the harm in that well will not differ as
4 between those two wells but the cost borne by the water
5 provider to treat the wells will differ and based on
6 experience, that is and frequently is the dominant focus
7 as to damages and discovery in these cases because the
8 plaintiffs' theory of liability is otherwise common and
9 damages as your Honors are well aware, is frequently a
10 hotly contested issue in all cases but that is especially
11 so when we're talking about treatment costs as expenses
12 as what we were talking about here.

13 So not foreclosing and the reason -- not
14 foreclosing their ability to pursue their defenses as
15 they see fit and as they have already and the reason I
16 was saying and the only reason I was saying that it
17 would take years is not the number wells but instead, the
18 ability for the defendants to talk about and -- pardon me
19 -- to discover the damages associated with each plaintiff
20 in the depositions and written discovery that they would
21 assuredly be entitled to as to each plaintiff.

22 JUDGE GERSHON: So going back to my earlier
23 question, so you seem to be emphasizing that the
24 discovery that the defendants will want will be from each
25 of the 27 plaintiffs is going to be about damages and

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1 nothing else. You seem to think that's what's going to
2 take years to do, damages discovery. I'm struggling to
3 see why that should be the case but we'll hear from the
4 defendants.

5 Let me just make sure that Judge Mann doesn't
6 have anything else or any follow-up before I turn to the
7 defendants here.

8 JUDGE MANN: Not at all. Not at all.

9 JUDGE GERSHON: Okay.

10 MR. EDLING: Your Honor, sorry?

11 JUDGE GERSHON: Yes.

12 MR. EDLING: Matt Edling.

13 I want to be, sorry, very, very clear.

14 Obtaining all discovery --

15 JUDGE GERSHON: You keep saying -- Mr. Edling,
16 Mr. Edling, you keep --

17 MR. EDLING: Yes, your Honor.

18 JUDGE GERSHON: -- you want to be clear but the
19 reason we have so many questions is maybe you're not
20 quite as clear as you want to be.

21 MR. EDLING: Well --

22 JUDGE GERSHON: So try again.

23 MR. EDLING: -- then for that, I apologize. I
24 apologize if I am not being as clear as I need to be.

25 The discovery in 27 cases, to ready 27 cases

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1 for trial, will necessarily take longer than preparing
2 less than 27 cases.

3 JUDGE GERSHON: How much longer is my question?

4 MR. EDLING: There are --

5 JUDGE GERSHON: How much longer? What are we
6 really talking about. You've said damages, I can
7 understand that but apart from damages --

8 MR. EDLING: Sure.

9 JUDGE GERSHON: -- which would be separate for
10 each plaintiff --

11 MR. EDLING: Sure, I --

12 JUDGE GERSHON: -- but maybe I should be asking
13 the defendants about this because it's not your
14 discovery, it's their discovery of you, right? You want
15 to make it very lengthy, I mean obviously for your own
16 strategic purposes, you want to say their discovery of
17 you is going to take forever but I don't know if that's
18 the case.

19 Let me talk to them. Okay. So defendants,
20 this is a slightly different point but we've touched on
21 it, it has to do with the third-party potential
22 pleadings. You say you need discovery to identify
23 sources who you might add as third-party defendants and I
24 do want to make a point here that I'm concerned with your
25 nomenclature.

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1 Obviously, the plaintiffs claim is that your
2 clients are the sources, the actual polluters. I think
3 what you're referring to is something we could call
4 "intermediate sources", who I assume are your customers
5 or your customers' customers and I don't know why you
6 think this information would be more available from the
7 plaintiffs than from your own files.

8 The plaintiffs are saying that source questions
9 should be part of expert discovery. I'm curious as to
10 your position on that and then I'm curious as to your
11 position a to -- that there can be no decisions about
12 priority until all the pleadings are complete. What
13 about before expert discovery is done?

14 And why, I'm raising a new question presented
15 by Mr. Edling, why can't you decide these third-party
16 issues already, if you've been pursuing your third-party
17 discovery? So that's a bunch of questions.

18 MR. BOULOS: Very good, your Honor. Nader
19 Boulos again on behalf of Dow.

20 I'm going to try to take them all and please, I
21 know your Honor will tell me if I miss one.

22 JUDGE GERSHON: Yes.

23 MR. BOULOS: It is --

24 JUDGE GERSHON: Not to worry.

25 MR. BOULOS: It is definitely not our position

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1 that 100 percent of discovery in all the cases has to be
2 done before any discussion or decisions on prioritization
3 can be made. It's not even to -- your Honor's question
4 was are we saying that all expert discovery needs to be
5 done? We're not and in our submission, we were not even
6 asserting that all fact discovery needs to be done.

7 JUDGE GERSHON: Let me interrupt you for a
8 second. I understand that and frankly, I didn't
9 understand it. I mean, I understood what you said but I
10 didn't -- my question about how much additional discovery
11 would be needed once we finish the Suffolk County case,
12 is really directed at both sides.

13 I understand that you said oh, we can decide
14 prioritization maybe in a year from now or whenever, but
15 I'm trying to get an overall picture of what this case
16 looks like or cases look like and how much discovery
17 really would be if we finished all the discovery in the
18 Suffolk County case. How much is left for these 27
19 cases?

20 So I am really asking you to address not your
21 position but my surprise about your position, shall we
22 say.

23 MR. BOULOS: Understood, your Honor.

24 The proposition -- the concept of doing the
25 discovery in the Suffolk County case really has two --

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1 there are two sides to that coin. There's the discovery
2 the plaintiffs want to do of the defendants and I think I
3 heard Mr. Edling say that that would be all of the
4 discovery that they want to do of the defendants for all
5 the cases, and that doesn't surprise me.

6 JUDGE GERSHON: Yes.

7 MR. BOULOS: And I think that's very easily
8 understood. The flip side of that coin, our discovery,
9 the defendants' discovery in the Suffolk County case,
10 would only be of Suffolk County Water Authority. It
11 would only relate to its wells. So it wouldn't include
12 any of the discovery on the 26 other cases.

13 Parenthetically, if we were to do, to be
14 required to do, the discovery in I'll put air quotes
15 around just the "Suffolk County" case by November, as the
16 plaintiffs suggest, that would at a practical level, if
17 we're going to do all the fact discovery on a 300-well
18 case, I don't think it will be done by November and it
19 certainly won't permit other discovery which now I hope I
20 will more directly respond to the other part of your
21 question.

22 JUDGE GERSHON: Okay.

23 MR. BOULOS: What other discovery would the
24 defendants need? We would need discovery in the other --
25 the other 26 cases would not be advanced at all from our

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1 perspective with respect to our defenses and I think
2 Judge Mann put her finger on this. The plaintiffs'
3 theory, the fact that they want to view this case from
4 the tree tops and say it's all -- we can prove or not
5 prove, as Mr. Edling allows, that all the warnings were
6 insufficient, that theory doesn't limit the defendants'
7 defenses.

8 We are allowed, and in fact we have to, drill
9 deeper than that and say who did those warnings go to,
10 when, what did they know, and match that against what the
11 contamination picture is at the wells. So that's why we
12 need basic discovery in the other cases.

13 Now to return to an observation your Honor made
14 at the outset, which is --

15 JUDGE GERSHON: Excuse me. You're saying what
16 did who know, the people that you sold it to?

17 MR. BOULOS: The --

18 JUDGE GERSHON: Who are you talking about?

19 MR. BOULOS: Whoever it is shown to be -- we
20 need to go backwards from the presence of dioxane in a
21 well to the source of that dioxane. That, I don't mean
22 to quibble the nomenclature --

23 JUDGE GERSHON: Okay.

24 MR. BOULOS: -- but that is the actual
25 polluter, the person or entity that released the product

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1 that found its way into the ground water and then
2 identify, understand what warning that person had and
3 what they knew. Was there a failure to warn that person
4 and was that a substantial factor in leading to the
5 presence of dioxane?

6 JUDGE GERSHON: And you're saying you don't
7 know who those people are?

8 MR. BOULOS: That is correct. We don't know
9 that and Mr. Edling said there have been years of
10 discovery about sources of contamination, that is not the
11 case. We sit here with the plaintiffs still not having
12 completed their initial document production, with third
13 parties not having completed their document production.
14 So that discovery is not complete.

15 I recall your Honor asked a question about
16 whether that's an expert discovery issue or maybe Mr.
17 Edling's comment, I'm recalling.

18 JUDGE GERSHON: No, no, I did ask about that.

19 MR. BOULOS: Okay.

20 JUDGE GERSHON: Or I think based upon what the
21 plaintiffs had suggested.

22 MR. BOULOS: And the answer to that is there is
23 at least some ordinary course of business information
24 that we should -- that we are seeking in discovery that
25 shows what these water districts did to actually

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1 investigate and determine what those sources were.

2 Now maybe some of them will say they didn't do
3 any and if that's the record in discovery, that will be
4 the record in discovery but what we're asking for now is
5 not the whole -- we're not suggesting, maybe this goes
6 back to my comments a few minutes ago, we're not
7 suggesting that you have to take this all the way through
8 expert discovery necessarily before making any decisions
9 on structuring or prioritization if we're going to use
10 that label, what we want is to develop the factual
11 record, understand what information the water districts
12 themselves had or maybe some of these third-party
13 governmental agencies had that will help us understand
14 who the actual polluters were of the well (audio
15 interference).

16 JUDGE GERSHON: Maybe it would help me if you,
17 and Judge Mann, if you identify the types of expert
18 discovery that is actually involved in this case.
19 Usually in an MDL, expert discovery is a driver. Here,
20 it seems not to be. Nobody's really mentioned and it's
21 not even on your schedule of proposed discovery, what
22 kind of expert discovery are we talking about?

23 MR. LENDER: Your Honor?

24 JUDGE GERSHON: What are the subject areas.

25 MR. LENDER: Your Honor, this is David Lender

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1 for Proctor & Gamble.

2 I just -- I think it would be worth, if I
3 could, just take a moment and talk about us because this
4 -- you know, for most of the conversation we've been
5 talking about the industrial defendants but there's only
6 one consumer company that's (audio interference) and
7 that's P&G.

8 JUDGE GERSHON: Yes.

9 MR. LENDER: And you know where you started at
10 the beginning of this conversation which is how is
11 Suffolk County representative of the 27 cases, if we're
12 going to go down that route, I did hear a reference to
13 the Manual for Complex Litigation but as your Honor
14 knows, the Manual for Complex Litigation talks about the
15 specific plaintiffs and their claims being representative
16 of the cases.

17 And the issue here is when you heard the
18 description of why plaintiffs want to proceed with
19 Suffolk County is because apparently they have a view
20 that there are certain of the wells within Suffolk County
21 that may have, some allege, some impact by P&G but in
22 terms of expert discovery and actual fact discovery, as
23 your Honor knows we are just one of hundreds and hundreds
24 of consumer products that people use that have some trace
25 amounts of 1,4-dioxane and that is an unintended

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1 byproduct of the manufacturing process.

2 And we, one of our big issues which is what
3 really makes Suffolk County not representative is the
4 causation element because if you're just going to name
5 one of hundreds and hundreds of products, what if any is
6 our contribution versus everyone else's contribution?
7 And that is going to be the subject of both discovery but
8 clearly also expert discovery because that would be one
9 of the core issues that I just wanted to make sure was
10 not being lost as we're talking about product warnings or
11 products that people are selling when they're selling
12 1,4-dioxane that just -- we're just in a very different
13 position.

14 JUDGE GERSHON: Well --

15 MR. LENDER: And Shell is --

16 JUDGE GERSHON: Okay. Let me just ask you this
17 then, you're saying your contribution would be subject to
18 expert discovery, assuming that that's correct. Why
19 wouldn't that happen if there was -- if plaintiffs'
20 proposal to go forward with Suffolk first was adopted?

21 MR. LENDER: We just want to make sure that we
22 also would have the opportunity, there's an initial
23 complexity that we're going to want to and need to take
24 discovery of third parties in order to make sure that
25 we're identifying all of the (audio interference) -- I

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1 don't know how many products there are that have 1, 4-
2 dioxane that I guess go down the drain and also arguably
3 would be a contributor, if not a bigger contributor, to
4 the extent the consumer products are contributing
5 anything.

6 JUDGE GERSHON: Well, nobody's been stopping
7 you from taking such discovery, have they?

8 MR. LENDER: No, no, we've -- to be honest,
9 we're -- the plaintiffs have not really spent a lot of
10 time talking to us, but no, we can proceed and we wanted
11 to see where we were going in terms of priority and
12 discovery but yes, I mean obviously depending on what
13 comes out of this, we will proceed with that kind of
14 discovery.

15 JUDGE GERSHON: I see. Okay.

16 JUDGE MANN: This is Judge Mann again.

17 JUDGE GERSHON: Judge Mann, you're -- it's not
18 clear.

19 JUDGE MANN: Is it? Okay. I'm sorry. I just
20 wanted to ask a question of Mr. Boulos is just --

21 JUDGE GERSHON: All right. Let me just ask --

22 JUDGE MANN: -- (audio interference) --

23 JUDGE GERSHON: -- can those --

24 JUDGE MANN: -- I'm sorry.

25 JUDGE GERSHON: I can't hear you. Can other

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1 people hear Judge Mann? If other people can, I'll try to
2 change my -- I'll do something --

3 MR. EDLING: No, your Honor.

4 JUDGE GERSHON: -- to my phone.

5 JUDGE MANN: (Audio interference).

6 JUDGE GERSHON: No.

7 UNIDENTIFIED SPEAKER: I apologize, Judge.

8 JUDGE GERSHON: I think it's your line, Judge
9 Mann, there's some problem.

10 JUDGE MANN: I think it may be my headphones.
11 I'm not (audio interference).

12 JUDGE GERSHON: Yeah, maybe try the speaker or
13 something different.

14 JUDGE MANN: Can you hear me now?

15 JUDGE GERSHON: Perfect.

16 JUDGE MANN: Okay.

17 JUDGE GERSHON: Perfectly.

18 JUDGE MANN: It was my headphones.

19 JUDGE GERSHON: Oh, okay.

20 JUDGE MANN: I apologize to everyone.

21 JUDGE GERSHON: Okay.

22 JUDGE MANN: I wanted to ask Mr. Boulos a
23 question that Judge Gershon put to Mr. Edling, and that
24 is, you know, do the defendants have in mind any criteria
25 or metrics by which they would weigh in on

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1 prioritization. I understand you say you need more
2 discovery to ascertain the underlying facts. That said,
3 you know, the Suffolk County case has been pending now
4 for over three years, I'm sure you've thought about the
5 issues and what is it that you're looking for, what do
6 you think would make a case representative and therefore,
7 an appropriate bellwether or test case?

8 MR. BOULOS: Well, your Honor, it's Nader
9 Boulos again, it's not clear on the record that we have
10 now what could be common across the cases but it could
11 be, for instance common polluters, customers, as Judge
12 Gershon referred to them, whether direct or indirect, but
13 you could have common polluters across different wells
14 maybe even cutting across districts, that could make a --
15 that could provide a candidate for an approach on how to
16 either structure a case or subset of a case or a cross
17 case sample for briefing or trial.

18 There could be issues like the statute of
19 limitations offense. There could be issues based on the
20 level of contamination in certain wells. And I know this
21 is -- I'm answering in a higher level of generality than
22 I would like to for what is a specific question but I'm
23 somewhat constrained to do that because we just don't
24 have that record yet on the other cases.

25 I also think at a very practical level, I am

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1 sure one of the considerations will be what can be
2 presented -- what can be prepared for trial, and what can
3 be presented in a manageable way, and I think to the
4 extent those are yardsticks, Suffolk County is going to
5 come up short unavoidably compared to other water
6 districts because of its size.

7 There is simply just as a matter of common
8 sense, it will take shorter, it will take less time in
9 discovery to prepare a case with fewer wells. There will
10 be less plaintiff discovery, less third-party discovery
11 required there. It will take less time to try a case
12 with fewer wells.

13 I'm not suggesting today that the Court has to
14 adopt those or should adopt those as the metrics but I
15 think those will go into the calculus.

16 Back to a question that was asked earlier, how
17 much time would it take to do all the discovery the
18 defendants want of the plaintiffs in all the cases, I
19 think that -- I think we could proceed on that approach
20 and what we were already proposing was to do discovery in
21 parallel and check back in with the Court in nine months
22 after the end of document production. I don't think that
23 will be sufficient to do at all but I do think it can all
24 be done in a manageable and efficient way.

25 There's been no scorched earth litigation in

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1 this case and there's no reason to believe that there's
2 going to be. The defendants don't have any interest in
3 taking more depositions than we need to and we propose
4 structurally a mechanism where we would report to the
5 Court regularly and if anybody thought discovery was
6 getting out of hand, the Court could intervene.

7 So I think we could, and this is just to wrap
8 it up, goes back to Judge Gershon's observation at the
9 beginning of the case that in some way -- the beginning
10 of the call, that in some ways this is like an MDL.
11 Well, that -- if there is one thing we can take from the
12 MDL is that you do the fact discovery and return cases
13 for trial. I'm not necessarily saying we need to do all
14 the fact discovery. Our proposal in our letter of last
15 week allows for us to do an initial period and check in
16 and I suggest that's a sensible way to proceed.

17 JUDGE GERSHON: So you think that less
18 discovery will be needed than what the plaintiffs think?

19 MR. BOULOS: I don't think that it will be
20 unmanageable in any way. It will be discovery -- the
21 plaintiffs' side, the plaintiffs' discovery of us will
22 not be expanded at all. Our -- yes, we'll have more
23 discovery to take --

24 JUDGE GERSHON: Right.

25 MR. BOULOS: -- more depositions --

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1 JUDGE GERSHON: Okay.

2 MR. BOULOS: -- but there's no reason to think
3 that that should be unmanageable.

4 JUDGE GERSHON: All right. Let me ask one
5 final set of questions which will lead us into -- that
6 really relate to discovery and then will lead us to Judge
7 Mann's world, I am concerned about there being too many
8 layers of discovery that are being proposed by both
9 sides. For example, there are proposals for depositions
10 for determining priority and then there are depositions
11 for "full discovery".

12 Put another way, the defendants on page 1 of
13 their letter say "Some discovery short of the completion
14 of full fact discovery is needed before trial decisions
15 are made". And I'm not sure -- maybe you tried to answer
16 this already and maybe I just haven't understood it, but
17 I don't exactly understand what would be the subject of
18 discovery after trial decisions are made, and would that
19 be different from a decision on when we do summary
20 judgment briefing? Defendants also refer to something
21 called "basic discovery" in all cases. I just don't know
22 what that means.

23 So if either side can try to respond to that,
24 and then after that, well, we'll turn this over to Judge
25 Mann.

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1 MR. BOULOS: Your Honor, it's Nader Boulos.

2 JUDGE GERSHON: Okay.

3 MR. BOULOS: It was my (audio interference), so
4 I'll go first. We are -- all we are talking about is the
5 ability to start to deposition discovery. We would be
6 perfectly content to set one schedule to do fact
7 discovery and take it through its completion and just do
8 the discovery that's needed in the cases.

9 We understood that the Court was looking to us
10 to come up with a way to eventually decide on something
11 short of completing discovery in all of the cases, and
12 that's why we proposed this approach where we would do
13 nine months of discovery and then report back in.

14 To be clear --

15 JUDGE GERSHON: But do you think --

16 MR. BOULOS: Yeah, sorry.

17 JUDGE GERSHON: Do you think that there's
18 something that's going to be -- what I am concerned about
19 with these layers of discovery is that you'll end up
20 doing more discovery than you would have done had you
21 just completed all the discovery in all the cases.

22 In other words, every time you call witnesses,
23 you have to ask them what's your name, where do you work,
24 what do you do, dah-dah-dah. I mean, you know, you have
25 to go on and --

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1 MR. BOULOS: Understood.

2 JUDGE GERSHON: Why call these people --

3 MR. BOULOS: (Audio interference).

4 JUDGE GERSHON: Plaintiff says you're going to
5 call these people back three times; is that true?

6 MR. BOULOS: No. It definitely isn't.

7 JUDGE GERSHON: Oh, that's (audio
8 interference) --

9 MR. BOULOS: And I appreciate the opportunity
10 to respond to that --

11 JUDGE GERSHON: Okay.

12 MR. BOULOS: -- because I had that on the list.
13 We definitely intend this to operate as multiple layers
14 of depositions of the same people, multiple bites at the
15 apple and we would be, I think -- I do appreciate the
16 Court's sense that it might just be more efficient to set
17 one deadline, whether that's 12 months or something else
18 and come back if you need more time and just do all the
19 discovery.

20 But if we were to -- the way our approach was
21 intended to operate was that if we depose someone during
22 this nine-month period, same rule for the plaintiffs,
23 deposing one of our witnesses, the presumption would be
24 you would not depose that person again. If you did, it
25 could only be on something that isn't duplicative. For

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1 instance, if you found out that some employee was also
2 responsible for other wells, (audio interference) go and
3 take the deposition of other wells but you could only do
4 that with agreement of the parties or leave of court.

5 So we were trying to build in, in fact, a
6 prohibition against multiple layers because we don't want
7 to depose people multiple times and we certainly don't
8 want our people deposed multiple times.

9 JUDGE GERSHON: Okay. All right. Do we all
10 have the energy to continue, need a break or Judge Mann,
11 can you take over?

12 JUDGE MANN: I'm happy to take over, let me
13 just check that everyone can hear me?

14 JUDGE GERSHON: Yes, I can.

15 JUDGE MANN: (Audio interference)?

16 JUDGE GERSHON: Yes.

17 MR. EDLING: Yes, your Honor.

18 JUDGE MANN: There's one issue that is not
19 really a discovery issue but my curiosity was peaked and
20 that is that Mr. Edling -- it seemed to me listening to
21 all these arguments that what would be most efficient if
22 the plaintiff says we have a theory and if we're right,
23 then all defendants are liable.

24 It seems to suggest that the most efficient
25 way of proceeding would be to bifurcate liability and

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1 damages and Mr. Edling has said that the plaintiffs are
2 opposed to that. And I guess if this is going to be
3 litigated, I don't want to open up oral argument now but
4 I'm curious as to a very brief response from Mr. Edling
5 as to why the plaintiffs would oppose that and then I
6 certainly would solicit the defendants' view on that
7 approach.

8 MR. EDLING: Sure. This is Matt Edling. Thank
9 you, your Honor.

10 My experience in these cases, it would lead to
11 necessarily duplicative discovery of multiple witness and
12 here would be a reason. Mr. Boulos identified statute of
13 limitation as one issue that (audio interference) would
14 want discovery on. So for example, if they were to
15 depose the superintendent or consultant for a particular
16 water provider as to when he or she were on notice of
17 dioxane present in their wells and what did they do when
18 they were on notice of that, they will answer and what it
19 will at some point get to is well, what did you do when
20 you discovered it, which then will lead to the cost of
21 treatment which would then be arguably a damages issue
22 and the line between what is damages and what is
23 liability in these cases frequent overlaps. It was for
24 that reason.

25 I also in turning that there was a suggestion

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1 at trial of bifurcating liability and damages and we
2 would contest that because having a different jury hear
3 damages versus liability is something I would at least
4 like the opportunity to brief before your Honor if that's
5 where we are but the first goes to duplicative discovery
6 and the second goes to the presentation of the
7 plaintiffs' case.

8 JUDGE MANN: All right. And I, just out of
9 curiosity, what is the defendants' position on that
10 issue?

11 MR. BOULOS: Your Honor, Nader Boulos.

12 It's really not an issue that I've considered
13 yet or conferred with my client on and I really don't
14 speak for the other defendants on it, so I really can't
15 give you a position, I apologize but that's why I can't.

16 One comment though is that the discovery we
17 need from the plaintiffs is not damages discovery. Of
18 course, eventually we will need damages discovery from
19 the plaintiffs but the kind of discovery we've been
20 talking about today that defendants need from the
21 plaintiffs is liability discovery not damages discovery.

22 So bifurcation of the liability and damages
23 wouldn't speak to -- wouldn't be a way to streamline
24 discovery or wouldn't be a way to obviate the discovery
25 that Mr. Edling seems not to want which is where I think

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1 this line of conversation began, if I haven't hopeless
2 confused it.

3 JUDGE MANN: All right. With respect to
4 discovery, one problem that Judge Gershon and I had was
5 because we got simultaneous submissions from the parties,
6 it wasn't entirely clear to us as to what, if anything,
7 the parties had agreed to. You know, we had from one
8 side, an 11-page submission, the other side a 7-page
9 submission. You have to go back and forth to try and see
10 if there are any overlapping proposals or understandings.

11 And going forward, we both would find it very
12 helpful if the parties begin with a clear statement as to
13 what, if anything, they've agreed to after a meet and
14 confer on discovery or other issues.

15 Let me address plaintiffs' counsel first. Both
16 sides seem to agree that the discovery of defendants in
17 one case will be usable across all cases, I think that's
18 not disputed but one thing that the plaintiffs haven't
19 addressed is this. Assuming relevance, putting that to
20 the side for the moment, shouldn't that also be true for
21 discovery taken from the plaintiffs and their
22 consultants? And that is -- my understanding is that is
23 what the defendants are proposing. So is that agreeable
24 to the plaintiffs?

25 MR. EDLING: This is Matt Edling, your Honor.

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1 I'm sorry, I don't -- the first part of your
2 question is correct. The second part, I don't understand
3 and I apologize.

4 JUDGE MANN: Well, my question is if there are
5 consultants -- well, maybe I should address that first.
6 As I understand it, both sides talk about plaintiffs'
7 consultants.

8 MR. EDLING: Yes.

9 JUDGE MANN: To clarify, I assume that we're
10 talking about nonlitigation experts --

11 MR. EDLING: Correct.

12 JUDGE MANN: -- who would be called to testify
13 as fact witnesses, correct?

14 MR. EDLING: Yes, this is Matt Edling.

15 Yes, that's my presumption as to what the
16 defendants are getting at and I think I now understand
17 your question.

18 JUDGE MANN: And I take it that they either
19 discovered or confirmed that the contamination is -- and
20 perhaps played another role, perhaps in remediation
21 proposals or --

22 MR. EDLING: Yes.

23 JUDGE MANN: -- can you tell me what, you know,
24 roles they played?

25 MR. EDLING: Sure, yes. Yes, sure, your Honor.

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1 Many of the water providers have outside consultants that
2 provide that type of investigation and engineering as
3 your comments and questions just elucidated and there are
4 frankly only a couple of firms that provide that to the
5 water providers on the island.

6 Within each of those consulting firms, there
7 would be engineers associated with particular providers.
8 There may be and in fact, are engineers that provide
9 those services to multiple providers and I am not
10 terribly in the habit of trying to help the defendants
11 get more discovery than they're entitled but here would
12 be a reason why the defendants are entitled to depose a
13 consultant perhaps more than once which is the following.

14 If Susan Smith is the consultant for Jericho
15 Water District and South Farmingdale Water District and
16 provides different services and provided different
17 analyses for each of those plaintiffs, I don't think it
18 would be fair to say Ms. Smith could only be deposed
19 once, although we would, of course, want to work with the
20 defendants on reasonable depositions of Ms. Smith as to
21 each of those plaintiffs. Did that make sense, your
22 Honor?

23 JUDGE MANN: Well, why not have a combined
24 deposition because while there may be different services
25 provided, I assume that to the extent that there are

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1 questions about her knowledge and experience and the
2 like, why shouldn't a deposition apply across all cases
3 in which she might have involvement.

4 MR. EDLING: I see. I see. Indeed, your
5 Honor, on that I am sure myself and Mr. Boulos and our
6 colleagues would certainly be able to work that out.

7 I was making the point that Ms. Smith worked as
8 to Jericho, would be specific to Jericho, and is not
9 necessarily dispositive of issues that defendants would
10 want to explore as to her work for South Farmingdale.
11 That was the only point I was trying to make.

12 JUDGE MANN: Do you know, did each of the
13 plaintiffs engage a consultant?

14 MR. EDLING: Your Honor, with the exception of
15 Suffolk County Water Authority, each of the 25 plaintiffs
16 that my firm represents, do have outside consulting
17 firms. They are H2M and DMB primarily. Suffolk County
18 Water Authority has its own in-house engineering and did
19 not outsource that consulting. I do not know the answer
20 as to New York American Water. I do know that Hicksville
21 has its own consultant.

22 JUDGE MANN: And I take it from what you've
23 said that various plaintiffs used the same outside
24 consultants. You said there are essentially two firms
25 that provided this service.

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1 MR. EDLING: Correct.

2 JUDGE MANN: Do you know approximately how many
3 consultants there are across all 27 cases?

4 MR. EDLING: Yes, your Honor, it would be --
5 and the persons that would have the most knowledge as to
6 the issues that I assume the defendants would want to
7 explore is probably, although not entirely, less than
8 approximately 20, I would gather, 20 individuals.

9 JUDGE MANN: And those would be for Suffolk, it
10 would be -- they have their own in-house group --

11 MR. EDLING: Correct.

12 JUDGE MANN: -- or at least the Suffolk --

13 And getting back to my earlier question, is
14 there any reason why if these 20 individuals were to sit
15 for depositions, they couldn't be deposed in one
16 deposition and we can talk about how long that should be
17 but in a single deposition, should sit for -- should be
18 examined about all the cases?

19 MR. EDLING: This is Matt Edling, your Honor.

20 From my perspective, no, the defendants would
21 be able to question that consultant as to the water
22 providers that she provides services to.

23 JUDGE MANN: I'm actually not sure -- maybe it
24 was an inartful framing of the question but I was asking
25 can all the defendants question a consultant at a single

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1 deposition --

2 MR. EDLING: Oh, yes, yes.

3 JUDGE MANN: -- so that we don't have multiple
4 depositions.

5 MR. EDLING: Yes. Your Honor, the answer is
6 yes, that that particular consultant could sit for a
7 deposition. The defendants would all have the right to
8 depose her as to her work on behalf of the water
9 provider. I'm perhaps making an issue where there isn't
10 one. All I am saying is that particular engineer has
11 multiple clients and so if those clients are plaintiffs
12 in this litigation, the defendants would have the right
13 to question her as to each -- as to her work as to each
14 of those plaintiffs.

15 JUDGE MANN: And moving onto another discovery
16 related issue, the plaintiffs' primary proposal is that
17 prioritization should be determined based on documentary
18 discovery. At page 8 of their letter, the defendants
19 complain that a number of water districts have not
20 completed their fact sheets and/or their initial document
21 production. What is your response to that complaint?

22 MR. EDLING: My response -- this is Matt
23 Edling, your Honor -- is that is that incorrect. While
24 it is true, the document production is not complete for
25 all plaintiffs, that will be complete by next month.

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1 All of the plaintiffs have completed their fact
2 sheets. All of the plaintiffs have answered written
3 discovery.

4 JUDGE MANN: And I'm hoping that I am not going
5 to begin a deluge of discovery motions but have there
6 been any discussions between counsel about any alleged
7 inadequacies in the plaintiffs fact sheets?

8 MR. EDLING: This is Matt Edling, your Honor.

9 There have and I would say that the parties
10 have worked pretty cooperatively to resolve issues where
11 the defendants stopped -- or identified issues with fact
12 sheets that they believed were deficient, just as we have
13 tried to resolve issues where we believe that defendants'
14 production was deficient or their fact responses to
15 deficient -- were deficient such that we could avoid
16 bringing motions before your Honor and have not to date.
17 And I trust at least as to those types of issues, that
18 will continue to be the case.

19 JUDGE MANN: Well, and I hope you'll continue
20 to try and resolve those issues in good faith, so that
21 you at least -- you eliminate or at least narrow the
22 issues that are going to be presented to me down the
23 road.

24 As a compromise position, the plaintiffs had
25 proposed that "During the initial discovery period, the

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1 defendants would be permitted to take up to 50
2 depositions, including Rule 30(b)(6) depositions of any
3 or all plaintiffs and their relevant consultants" and
4 that's a quote from page 2 of your letter.

5 As there are 27 cases and at least 27
6 plaintiffs, wouldn't that proposal effectively afford
7 defendants collectively an average of one or two
8 depositions of plaintiffs and/or their consultants in
9 each case?

10 MR. EDLING: Yes, your Honor, and we identified
11 that as what we believe was a reasonable number for them
12 to determine in cases for prioritization. It was not our
13 intent that those would be the only depositions they
14 would be entitled to to complete discovery as to those
15 plaintiffs.

16 JUDGE MANN: But do you think that that is
17 reasonable given the number of plaintiffs as opposed to
18 the number of defendants? You know, we have five
19 defendants, so it's a much more limited universe. Do you
20 think 50 is a reasonable number, with 20 consultants and
21 27 plaintiffs?

22 MR. EDLING: Your Honor, this is Matt Edling.

23 Yes, I don't believe they need any depositions
24 to pick cases for prioritization but they do. Their
25 proposal was at least five for plaintiff which would be

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1 135 depositions. We thought 50 was a reasonable number
2 to be able to identify cases for prioritization.

3 Now if they wanted to spend five or ten
4 depositions of a single plaintiff, that was their right.
5 I don't believe that you need 135 cases to pick which one
6 -- 135 depositions to pick cases for prioritization.

7 JUDGE MANN: Well, the parties can't even agree
8 on and haven't really articulated what the criteria are
9 for making the selection of the test cases or
10 prioritization and if these are going to be -- we're
11 talking about bellwether cases, aren't they supposed to
12 be representative and how does one -- if you don't even
13 know what the metrics are, how can you determine what's
14 representative and what isn't?

15 MR. EDLING: This is Matt Edling, your Honor.

16 From plaintiffs' perspective, that was the
17 entire purpose of us working for months on fact sheets,
18 coming up with what those questions would be, together
19 with the defendants, fighting over inclusion and
20 exclusion of particular questions, then answering them in
21 good faith, producing documents in response thereto was
22 so that we could identify those cases for prioritization.

23 The proposal that provide additional written
24 discovery as to the parties, that the third-parties and
25 depositions was so that the defendants could identify

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1 plaintiffs that they believed for whatever purpose would
2 be appropriate for their determination for
3 prioritization, I have identified for you today and I
4 believe -- and I had thought that our submissions had
5 articulated what those common issues are.

6 If your Honor has continued questions as to
7 what might be metrics that the parties could agree on,
8 I'm -- I would hope that Mr. Boulos and myself and our
9 colleagues could identify potential metrics whether or
10 not we agree as to what cases satisfy those metrics.

11 JUDGE MANN: The -- in response to your
12 suggestion that the Suffolk County be prioritized,
13 defendants have suggested two other cases that are much
14 more limited cases and why are those -- what objection do
15 you have to those cases, other than that I assume you're
16 going to say it doesn't involve all defendants. Do you
17 have any other objections?

18 MR. EDLING: I don't have objections, your
19 Honor, to additional prioritized cases, I do have
20 objection to those cases not just because they don't
21 include all the defendants but a moment ago, I -- well, I
22 don't know how long ago, I identified that there -- that
23 we believe that there are additional unique issues that
24 are not present in Nassau County with respect to the
25 contribution of the harm. Those two particular water

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1 providers are in Nassau County.

2 If what your Honor -- if in part what your
3 Honor is getting at is counsel discussed with one another
4 metrics that you may believe are appropriate for
5 prioritization and please try to pick cases amongst
6 yourselves that satisfy those criteria, I take the
7 instruction and would try to do so but there are reasons
8 why I believe only having cases in Nassau County would
9 not be sufficient for Bellwether purposes, prioritization
10 purposes and frankly discovery inefficiency purposes.

11 JUDGE MANN: All right. Thank you.

12 MR. EDLING: If you --

13 JUDGE MANN: Do you have something else?

14 MR. EDLING: I was just trying to (audio
15 interference) --

16 JUDGE MANN: Mr. Edling?

17 MR. EDLING: Yes, your Honor. This is Mr.
18 Edling. I was just simply saying, we were never saying
19 just Suffolk County Water Authority. We thought that
20 they would want other cases for prioritization. It may
21 be that they want those two and we can discuss them.
22 That was the first time in the written submission that I
23 had ever seen them or discussed those particular water
24 providers with defense counsel.

25 JUDGE MANN: All right. Mr. Boulos, the

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1 defendants' proposal contemplates an initial discovery
2 period in which the defendants would be permitted to
3 conduct up to five depositions of each plaintiff and up
4 to five consultants retained by any plaintiff with
5 respect to the work performed for that plaintiff.

6 I now know that we're only talking about
7 approximately 20 consultants, so that at least limits it
8 somewhat. We're not talking about five consultants per
9 plaintiff but nevertheless, you're talking about in
10 excess of 150 depositions if my math is right, just to
11 determine prioritization and that's in addition to the
12 defendants' suggestion which plaintiffs do not oppose,
13 that plaintiffs collectively be authorized to take up to
14 ten depositions for each of the 50 defendants or an
15 additional 50 depositions.

16 So how is that an efficient use of the parties'
17 resources to conduct in excess of 200 depositions just to
18 determine what the test cases should be?

19 MR. BOULOS: Your Honor, we don't propose that
20 those depositions be taken only to determine what the
21 test cases should be. What we're asking for is the right
22 to take some depositions in these cases. They will
23 certainly, if the Court is inclined to adopt some sort of
24 prioritization approach, as opposed to getting the cases
25 through discovery and trying them in the order they're

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1 ready and I don't think any of us should pre-judge that
2 there will be an approach of prioritization.

3 I say that only because the Court has never so-
4 ordered. We've understood that's an approach the
5 plaintiffs want to take (audio interference) and what
6 we've been saying is we need some discovery whether cases
7 will be prioritized or not.

8 So to come back to your question more directly,
9 what we are proposing is that we be allowed start
10 depositions and understanding that the plaintiffs want to
11 propose some sort of priority approach and understanding
12 that it sounds like the Court has some interest in it,
13 allow us to then come back with the benefit of a record,
14 more discovery will allow us to I think identify the best
15 metrics for (audio interference) issue. And (audio
16 interference) --

17 JUDGE MANN: I would ask someone who is not
18 speaking to please mute your audio because I'm hearing a
19 lot of stomping in the background.

20 I'm sorry, Mr. Boulos, you can continue.

21 MR. BOULOS: Appreciate it, your Honor.

22 So to the question of how is our proposal an
23 efficient way to address these cases, this is discovery
24 that in each case is going to need to be done. We're
25 proposing that we start discovery in all these cases, do

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1 it in a nonduplicative way, so we're not saying this is
2 only for purposes of making a case structure decision.
3 Rather we're saying, we'll do it and then if the Court
4 wants us to return after some period of time to discuss
5 case structure, we'll have the benefit of that discovery.

6 And one of the decisions the Court might make
7 at that time is let's just try the cases in the order
8 that they can -- that discovery can be completed. We'll
9 know where we are with respect to completion of discovery
10 in the case.

11 JUDGE GERSHON: I may --

12 JUDGE MANN: Well, as a practical matter --

13 JUDGE GERSHON: Go ahead.

14 JUDGE MANN: Oh, go ahead --

15 JUDGE GERSHON: Oh, I just --

16 JUDGE MANN: -- Judge Gershon.

17 JUDGE GERSHON: Yes, sorry. Just one comment
18 that I wanted to make in response to Mr. Boulos' use of
19 the term "priority" and "prioritization", you're using it
20 very skeptically and you note in your papers that
21 prioritization isn't a word that's found in the Federal
22 Rules but neither is common sense and obviously, no one
23 can try 27 cases at the same time.

24 So at some point, we will have to decide what
25 to try first or what summary judgment to hear first. So

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1 this has to happen at some point. It's not a foolish
2 exercise. It has to happen and the question obviously is
3 when and how but there was something in what you said
4 just now that made me think that you weren't really
5 recognizing that we would have to make that decision.

6 MR. BOULOS: No, I apologize for that.

7 JUDGE MANN: And I was going to make a similar
8 comment which is as a practical matter, assume that the
9 Court said all right, just take your discovery in these
10 cases, we'll set a schedule. You're talking about many
11 of the same law firms across most of the cases and the
12 Court is not going to be setting different deadlines for
13 different cases absent some prioritization structure.

14 So there will come a time when presumably the
15 parties are all going to want to move for summary
16 judgment, you're really then talking, if there isn't some
17 prioritization of discovery at the discovery level, then
18 you're going to have all the cases coming to the same
19 point in this big bottleneck.

20 So I agree with what Judge Gershon said that at
21 some point, a determination is going to have to be made
22 as to what case gets tried first and why should that be
23 -- after full discovery has taken place.

24 MR. BOULOS: Understood, your Honor, and I
25 apologize for having obviously come off as suggesting

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1 otherwise. We do understand the Court is going to have
2 to make decisions about how to structure these cases and
3 before that, how to keep them advancing.

4 What we're trying to do -- what our proposal is
5 aimed at is advancing the cases now and developing a
6 concrete record for the Court to make those decisions
7 about how to structure the case.

8 JUDGE MANN: According to plaintiffs in
9 footnote 2 of their letter, they state that defendants
10 are proposing that plaintiffs be deposed separately as
11 fact witnesses, Rule 30(b) (6) witnesses and then again as
12 fact witnesses in connection with full discovery after
13 case prioritization.

14 You may have already addressed this and I
15 apologize if you did, but since we've been going at this
16 for two hours now, but is that a fair characterization of
17 the defendants' proposal and if it isn't, explain why
18 not?

19 MR. BOULOS: It is not, your Honor. Our
20 proposal, I will read here from paragraph number 2 on
21 page 5 of our proposal because we really wanted to be as
22 clear as we could and bake this into the letter itself.

23 We propose, and I'll quote, "a witness deposed
24 during the initial deposition period, will only be
25 redeposed by agreement of the parties or leave of court

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1 and only on nonduplicative matters."

2 So our proposal is that if a person -- whenever
3 deposition discovery starts, if a plaintiff is deposed,
4 that will be the deposition of that plaintiff unless
5 there's some nonduplicative deposition that we can either
6 convince the other side or convince your Honors that we
7 should be able to take down the road.

8 Now the naming of an individual witness as also
9 a corporate representative, I think that's something we
10 all are just -- we are taking an individual deposition
11 and we're told that that person will also be identified
12 as a 30(b) (6) representative, we can take those two
13 depositions at the same time.

14 JUDGE MANN: Well, I certainly did take note of
15 your proposal about the presumption and I immediately
16 thought there's going to be a lot of litigation over that
17 presumption. So I certainly hope that I am wrong in
18 expecting the worst.

19 I don't -- I think that covers everything that
20 I had intended to ask the parties.

21 JUDGE GERSHON: Yes, and I think I -- you made
22 a point about the two hours. I think we've exhausted the
23 issues -- we've exhausted ourselves if not the issues. I
24 guess we could just ask, if there's anybody who wants to
25 say anything nonduplicative at this point?

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1 Hearing silence, I think Judge Mann and I could
2 say adieu to everyone. Thank you very much. I hope
3 everybody is staying well during these continuing trying
4 times and let me just check my text to see if anybody
5 with me has any thoughts. Again, seeing nothing --

6 MR. EDLING: Your Honor, this is Matt Edling.

7 JUDGE GERSHON: Okay. Sure.

8 MR. EDLING: Just as an administrative matter,
9 I had offered your and Judge Mann's clerk with Mr. Boulos
10 as well, to send an email with all the persons that are
11 on this call.

12 JUDGE GERSHON: Okay.

13 MR. EDLING: I didn't actually get the email
14 address of the clerk that we were speaking to, so I would
15 just ask could I have that and then Mr. Boulos and I will
16 send the list of attendees for this.

17 JUDGE MANN: I'll have her send that to you.

18 This is Judge Mann --

19 MR. EDLING: Okay.

20 JUDGE MANN: -- so that we don't have to put it
21 on the record.

22 MR. EDLING: Sure. Thank you, Judge.

23 JUDGE GERSHON: All right. Then thank you
24 everyone very much --

25 MR. EDLING: Thank you.

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1 JUDGE GERSHON: -- and we will confer and
2 you'll hear from us. Thank you.

3 IN UNISON: Thank you, your Honor.

4 (Matter Concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 11th day of February 2021.



Linda Ferrara
Linda Ferrara

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